

Issues: Two Group II Written Notices (failure to follow instructions) and Termination;
Hearing Date: 06/19/17; Decision Issued: 06/21/17; Agency: DBHDS; AHO: Carl
Wilson Schmidt, Esq.; Case No. 11011; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11011

Hearing Date: June 19, 2017

Decision Issued: June 20, 2017

PROCEDURAL HISTORY

On April 4, 2017, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow instructions. On April 4, 2017, Grievant was issued a second Group II Written Notice of disciplinary action for failure to follow instructions. Grievant was removed from employment based on the accumulation of disciplinary action.

On April 15, 2017, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On April 25, 2017, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 19, 2017, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Representative
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notices?
2. Whether the behavior constituted misconduct?

3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?
4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?
5. Whether the Agency retaliated against Grievant?

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The Department of Behavioral Health and Developmental Services employed Grievant as a Housekeeping employee. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant's work shift was from 7 a.m. until 4 p.m. with a one hour lunch break from noon to 1 p.m. He was entitled to take two 15 minute breaks – one in the morning and one in the afternoon. The morning break was between either 9 a.m. to 9:15 a.m. or 9:15 a.m. to 9:30 a.m. The afternoon break was between either 2 p.m. to 2:15 p.m. or 2:15 p.m. to 2:30 p.m.

Grievant often needed to enter the chemical room at the beginning of his shift to obtain his cart and any needed supplies to take with him to his work area in the A/B wing. The chemical room was between the G and H wing. Stocking his cart should not take more than five or ten minutes even if other employees are also in the chemical room stocking their carts.

On August 30, 2016, the Supervisor held a staff meeting attended by Grievant and several other employees. The Supervisor told Grievant that housekeeping employees are prohibited from taking their breaks in the chemical room, mechanical rooms, and linen closets. Grievant was informed in writing:

Breaks are to be taken in either designated areas (Canteens) or out of the building (in your vehicle, at the tennis courts, etc.) They may not be taken in mechanical rooms, the chemical room, the linen room, in offices, or via random conversations with co-workers. Breaks are limited to 15 minutes in length and currently occur 2x per day – 1 in the morning and 1 in the afternoon. As breaks are not a guarantee, failure to adhere to these stipulations will result in their elimination, on a case by case basis.¹

Grievant questioned what he should do if he felt dizzy. He was told that he should notify a supervisor so he could be referred to the nurse practitioner or the shift administrator's office.

Agency managers received complaints from several staff that Grievant was spending too much time in the chemical room.

On February 21, 2017, the Supervisor entered the E Mechanical Room and observed Grievant seated. He arose when she entered the room. Grievant and the Supervisor walked to another area to meet with the Manager and HR Officer. During that meeting, Grievant mentioned that he was diabetic and that he carried his needles on him during work.

The HR Officer was concerned about patient safety because Grievant was carrying needles with him during work. She asked the nursing staff if there was a problem allowing Grievant to have needs while he worked. Nursing staff did not want Grievant carrying needles and felt this might create a risk of harm to patients. The HR Officer met with Grievant and told him he could not carry needles during work but could keep them in the Supervisor's office. Grievant had a key to the Supervisor's office and could enter when necessary to obtain the medicine. Grievant told the HR Officer he would keep his medicine and needles in his vehicle in the parking lot and would not use the Supervisor's office.

On February 24, 2017, the Supervisor gave Grievant a Notice of Improvement Needed/Substandard Performance stating, in part:

You were found sitting/taking a break in the E Mechanical Room during a period that you supposed to be working. At a department meeting on Tuesday August 30th, 2016, you were informed, both verbally and in writing that breaks " ... may not be taken in the mechanical rooms"²

On March 2, 2017, Grievant "clocked in" at 7:01 a.m. He entered the chemical room at 7:02 a.m. and remained there until 7:41 a.m.

¹ Agency Exhibit E.

² Agency Exhibit C.

On March 22, 2017, Grievant clocked in at 7:02 a.m. He entered the chemical room at 7:04 a.m. and stayed there until 7:44 a.m.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses “include acts of minor misconduct that require formal disciplinary action.”³ Group II offenses “include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action.” Group III offenses “include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination.”

Failure to follow a supervisor’s instructions is a Group II offense.⁴ Grievant only required approximately ten minutes to stock his cart in the morning. When he stayed more than ten minutes, he was taking an unscheduled break.

On March 2, 2017, Grievant took a break in the chemical room from 7:02 a.m. until 7:41 a.m. He remained in the chemical room for approximately 29 minutes more than necessary to complete his work duties. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for failure to comply with the Supervisor’s instructions not to take breaks in the chemical room.

On March 22, 2017, Grievant took a break in the chemical room from 7:04 a.m. to 7:44 a.m. He remained in the chemical room for approximately 30 minutes more than necessary to complete his work duties. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for failure to comply with the Supervisor’s instructions not to take breaks in the chemical room.

Upon the issuance of two Group II Written Notices, an employee may be removed. Grievant has accumulated two Group II Written Notices and, thus, the Agency’s decision to remove him from employment must be upheld.

Grievant presented witnesses who worked as housekeepers and said they took more than 10 minutes to stock their carts in the morning. None of those witnesses testified they required approximately 40 minutes to stock their carts.

Grievant argued that he was entitled to an accommodation because of his disability. Grievant asserted that he had diabetes and sometimes became light headed during work hours and, thus, remained in the chemical closet to rest. Agency managers testified that if Grievant felt dizzy he could sit down until his dizziness ended. None of

³ The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

⁴ See, Attachment A, DHRM Policy 1.60.

the Agency's witnesses testified that if Grievant became dizzy he would be permitted to walk to the chemical room to sit down. Grievant was told he should go to the shift administrator's office or visit the nurse practitioner when he became dizzy. Thus, the Agency accommodated Grievant by permitting him to rest. The Agency was not obligated to permit him to rest in the room of his choice, namely the chemical room. Indeed, the Agency specified he would take a break in the shift administrator's office or could visit the nurse practitioner.

Grievant argued the Agency failed to follow its protocol to use progressive disciplinary action. He contends the Agency should have issued Group I Written Notices without termination.

DHRM Policy 1.60 encourages agencies to implement progressive disciplinary action but it does not require agencies to do so. The Agency has presented sufficient evidence to support the issuance of two Group II Written Notices with removal. Although the Agency could have resolved this matter by taking lesser disciplinary action, it chose not to do so and the Agency has met its burden of proof.

Va. Code § 2.2-3005.1 authorizes Hearing Officers to order appropriate remedies including "mitigation or reduction of the agency disciplinary action." Mitigation must be "in accordance with rules established by the Department of Human Resource Management"⁵ Under the *Rules for Conducting Grievance Hearings*, "[a] hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency's discipline, the hearing officer shall state in the hearing decision the basis for mitigation." A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

An Agency may not retaliate against its employees. To establish retaliation, Grievant must show he or she (1) engaged in a protected activity;⁶ (2) suffered an adverse employment action; and (3) a causal link exists between the adverse employment action and the protected activity; in other words, management took an adverse employment action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse

⁵ Va. Code § 2.2-3005.

⁶ See Va. Code § 2.2-3004(A)(v) and (vi). The following activities are protected activities under the grievance procedure: participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before the Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law.

employment action, retaliation is not established unless the Grievant's evidence shows by a preponderance of the evidence that the Agency's stated reason was a mere pretext or excuse for retaliation. Ultimately, to support a finding of retaliation, the Hearing Officer must find that the protected activity was a "but-for"⁷ cause of the alleged adverse action by the employer.⁸

Grievant presented evidence that the Manager threatened staff to have them fired if they challenged him. Grievant asserted that the Manager knew Grievant intended to file a grievance to contest the Manager's action. Grievant has not established that his protected activity of filing a grievance was the "but-for" cause of the discipline in this case.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action for failure to follow instructions is **upheld**. The Agency's issuance to the Grievant of a second Group II Written Notice of disciplinary action for failure to follow instructions is **upheld**. Grievant's removal is **upheld** based on the accumulation of disciplinary action.

APPEAL RIGHTS

You may file an administrative review request within **15 calendar** days from the date the decision was issued, if any of the following apply:

1. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Please address your request to:

Director
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by fax to (804) 371-7401, or e-mail.

2. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing, you may request that EDR review the decision. You must state the

⁷ This requires proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer.

⁸ See, Univ. Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2534 (2013).

specific portion of the grievance procedure with which you believe the decision does not comply. Please address your request to:

Office of Employment Dispute Resolution
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by e-mail to EDR@dhrm.virginia.gov, or by fax to (804) 786-1606.

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 calendar days of the date the decision was issued. You must provide a copy of all of your appeals to the other party, EDR, and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative review have been decided.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.⁹

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant].

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

⁹ Agencies must request and receive prior approval from EDR before filing a notice of appeal.